

# Committee on Resources

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Tex G. Hall

President, National Congress of American Indians

and

Chairman, Mandan, Hidatsa & Arikara Nation

Testimony before the Committee on Resources

United States House of Representatives

Oversight Hearing on

"Can a Process be Developed to Settle

Matters Related to the Indian Trust Fund Lawsuit?"

July 9, 2003

## Introduction

Chairman Pombo, Representative Rayhall, and members of the Committee, thank you for your invitation to testify today. On behalf of the member tribes and individuals of the National Congress of American Indians, I would like to express our appreciation to this committee for its commitment to Indian people and to upholding the trust and treaty responsibilities of the federal government.

The Question posed before this hearing should perhaps be broken into two parts: (1) Should a process be developed to settle matters related to the Indian trust fund lawsuit?; and (2) Can an equitable process be established?

The answer to the first question is yes. Tribal leaders have consistently supported the goals of the Cobell plaintiffs in seeking to correct the trust funds accounting fiasco that has lingered for too long at the Department. At the same time, tribes are concerned about the impacts of the litigation. From the beginning, the DOI has operated with the primary interest of protecting itself from liability rather than complying with its statutory duties. See, e.g., *Cobell v. Norton*, 226 F. Supp. 2d at 11 (citing attempts by the DOI to cover up failures to comply with the Court's orders "through semantics and strained, unilateral, self-serving interpretations of their own duties"). This litigation posture has had a direct impact on the BIA's ability and willingness to provide the land management services that are so vital to tribes and individuals. Significant financial and human resources have been diverted by DOI machinations in response to the litigation. The BIA has become extraordinarily risk averse and slow to implement the policies, procedures and systems to improve its performance of its trust responsibility to Indian tribes and individual Indians. Perhaps most significantly, the contentiousness of the litigation is creating an atmosphere that impedes the ability of tribes and the DOI to work together in a government-to-government relationship to promote tribal self-determination and address other pressing needs confronting Indian country.

Continued litigation will cost many more millions of dollars and take many more years to reach completion, further impeding the ability of the BIA and the DOI to carry out their trust responsibilities. Because of this, NCAI believes that it is in the best interests of tribes and individual account holders that tribal leaders participate in the resolution of trust related claims and the development of a workable and effective system for management of trust assets in the future. See NCAI Resolution PHX-03-040, attached.

The answer to the second question is also yes, an equitable process for settlement can be developed, but it is not the one provided for in Section 137 of the House Interior Appropriations Bill. We are very pleased that

the Resources Committee understands the need to develop a process that would lead to settlement, rather than trying to settle a complicated and contentious matter of historical accounting in one fell swoop. The bottom line is that the DOI has not maintained a record keeping system that will allow a complete historical accounting, and the two parties to the Cobell litigation are very far apart in their views of what the Department's responsibilities should be. The goal should be to develop a good process of consultation that will lead to the development of a settlement proposal. If a good process is developed, then the end result will have legitimacy -- and that is the larger goal -- to compensate the account holders fairly and put the issue behind us so that Indian Country, the DOI, and Congress can move forward with the continuing progress of Indian people and tribal self-determination.

I serve as the President of NCAI, and the organization has not yet come to a position on what a settlement process should look like. I know that good ideas will come forward from Indian country, and the very beginning (as well as the middle and the end) of the process should include consultation with the tribes and the individual Indian account holders. NCAI is convening a meeting among tribal leaders on July 24 in Portland, Oregon to discuss this issue, and I know we will be scheduling additional meetings on the same topic, working collaboratively with the Intertribal Monitoring Association on Indian Trust Funds. We must develop a timetable, and I would suggest that we consult on this issue through the summer and fall, and develop a proposal by the end of February 2004.

In order to initiate discussion I would like to suggest a number of principles that I believe should be taken into account in developing any settlement process:

1) Take the time to do it right. NCAI has witnessed the trust reform efforts since the 1980's as one quick fix after another has been proposed, implemented, and eventually fallen to the wayside. We have wasted over 20 years looking for a quick fix. Developing a lasting solution is going to take time and resources. We should recognize that now and commit to doing it right.

2) Establish a process that will keep the pressure on for settlement. It is my understanding that the parties to the litigation have tried several times resolve the case but have been unsuccessful in reaching agreement. I believe that this has been due in large part to a failure to establish a structured process to support settlement discussions. Firm time schedules should be established with periodic reporting and incentives for reaching a settlement. While settlement deliberations are in process, I believe the litigation should continue until the historical accounting has been settled, and the Department has successfully implemented the necessary reforms to ensure sound trust management in the future. I would like to offer three specific suggestions for consideration:

a. Congress should be involved in developing a settlement process. I believe that the House Resources Committee and the Senate Committee on Indian Affairs should forge an alliance to work on this issue and convene meetings to consult with the parties to the litigation and with the tribes and the allottee associations. Out of these consultations, which could take place this summer and into the fall, we should develop a proposal for a settlement process.

b. Separate historical accounting from current accounting systems. Ensure that settlement also fixes trust systems for the future. The historical record has shown that DOI will only move forward in improving Indian trust systems if there is exterior pressure from the courts or from Congress. There are two critical issues here that need to be addressed: (i) the establishment of account balances (historical accounting); and (ii) the functionality of accounting systems. It would be disastrous to create a settlement that would resolve the past liability and then allow the DOI to relapse into ignoring its responsibilities for Indian trust management and accounting.

c. An independent body should play a significant role in the settlement process. The parties to the litigation have a significant financial stake in the outcome. The tribes and the IIM account holders will distrust any process where the Secretary of Interior is in control of all aspects of the settlement. To ensure fairness and transparency, an independent body should play a significant role. One function would be to ensure that the settlement offer has an objective basis to ensure legitimacy and fairness. At a minimum, each account holder is entitled to an accounting, and if the federal government cannot provide that, they should receive the value of an accounting. In addition, the account holder should have a clear understanding of what property and funds are involved and what kind of revenues should have been received -- whether this information is from actual records, or a comparison and analysis of similar properties and accounts. The account holders should have unimpeded and cooperative access to work with the local BIA Agency Superintendent to gather information about their holdings and comparative information about similar

holdings.

3) One size will not fit all. There is a great deal of diversity among account holders. Some have large stakes in very valuable natural resources, such as oil, gas, or timber. Others have only a small fractionated interest that is worth less than a dollar. Any settlement process must be able to deal with different classes of accounts and interests.

4) Account holders should have the opportunity to negotiate and make a choice. You cannot force a "settlement." In today's world, the hallmark of fairness is the ability to negotiate an arms length agreement based on a reasonable knowledge and understanding of the underlying facts and circumstances. Indian account holders must also have this ability.

5) Move quickly to bring relief to elder account holders. Many of our elders have suffered extreme economic deprivation throughout most of their lifetimes. They should have an opportunity to improve their financial conditions without delay.

6) Do not allow the settlement process to prey on the most vulnerable. Many Indian people are not in a good position to evaluate whether or not they are receiving a fair settlement. They do not have good information about their property or the activities that took place on it. Many are economically impoverished or are traditional language speakers and could be wrongly encouraged to simply accept any offer of a settlement – no matter how unfair.

7) Funds for the settlement must not deplete funding for federal Indian programs. The resources for fixing the broken system must not come from reprogramming the budget away from other vitally needed BIA services. This is one area where we agree with Section 137. The judgment fund is the right source of federal money to settle Indian trust claims, so long as the DOI is not required to reimburse the judgment fund.

8) Consider the impact on tribal trust fund claims. It must be clearly understood that the Cobell litigation involves only the individual Indians claims for trust fund accounting. The tribal trust fund claims are separate and involve very different issues and will have to be resolved on a separate basis. At the same time, any settlement process will set precedents for the tribal claims and this should be kept in mind as the process moves forward.

#### The Views of One IIM Account Holder on Information Needed to Settle

I am a cattle and buffalo rancher, an owner of trust land within the Mandan, Arikara & Hidatsa Nation Reservation, and also an IIM account holder. I believe it might be instructive to share my own personal views on what information I believe would be necessary for me to consider a settlement for my trust fund accounting claims. Although there certainly are Indians with much more valuable lands than my own, I own a significant amount of trust land that is in various uses and is in some ways a microcosm of issues you will find in developing a process for settlement.

I am the sole owner of seven different parcels of trust land which total slightly over 1000 acres, and I own fractionated interests in another seven or eight parcels, although I am never certain of these fractionated interests. I directly manage three of the larger units of land in my ranch operation, so these funds do not go through my IIM account. However, the other four units of land are managed by the BIA and grouped together with other trust land to form grazing ranges that are permitted to other cattle ranchers for an annual grazing fee. The BIA has leased some gravel mining on these lands.

I also know that the one parcel of land that I inherited from my mother's side has had significant oil development in the past. The northwest corner of our reservation had a lot of oil development and oil leasing beginning in the 1950's and continuing through the 1980's. Up to 1980, my mother was receiving significant oil revenues from her lands - which have now passed to me. Today they are considering some new oil development up there, so it could be that this property will be in production once again.

My concern with BIA accounting is that I occasionally receive a trust funds check in the mail, but I never receive any information about which property the funds were received from. It could be from any one of the four full allotments, or from the fractionated interests, or from some combination. I don't know what leases have been let out, or what rate they received, or whether the full amount was correctly collected, invested and distributed. All I get is a check in the mail. I am supposed to trust the BIA that everything was

accounted for correctly. My mother had the same concerns with her oil lease. She would simply receive a check from the BIA with no indication about how many barrels or the market rate at which they were sold.

Let's consider the unlikely scenario that one day the Secretary of Interior showed up on my doorstep, checkbook in hand, and said "Tex Hall I would like to settle your IIM accounting claims, how much do you need to make your claim go away?" Well I would be extremely surprised, and then grateful for so much attention from the Secretary, but then I would have to invite her inside for a cup of coffee and explain that I will need some information before I am able to settle my claim.

First, I would need a listing of all the tracts of land in which I have an ownership interest, and this includes my share in the fractionated lands where I have never received clear information on exactly what I own. Second, I need to know what activities and leases have taken place on those lands - is it grazing or gravel or coal or oil? Of course I would want to have a full accounting. I want copies of all the leases. I want records of exactly how much was distributed in the past, to me and to my parents. I want to see the accounts receivable and the accounting ledger to see if the lease payments were properly collected, invested and distributed.

But let's say that the Secretary responds that records are missing and a full accounting is not possible. I would want to know what records are available and what is missing but even this, she responds, would be very expensive and time consuming -- so she would like to see if we can settle with somewhat less information than that.

Even in the lack of a full accounting, I could see my way clear toward a settlement if I had some other kinds of information to make an educated estimation. I would still need to know exactly what property I own and have a good general sense of what activities took place on those properties. For this I believe I would need to have access to the BIA Agency Superintendent and the realty office personnel. Our local BIA people have a lot of information and I generally trust them to be truthful with me. I believe that having a cooperative and open relationship with the local BIA would facilitate settlements much more readily than the current adversarial approach.

If we were considering the oil property, I would want to have a professional and independent opinion about how much property such as my mother's should have produced. This could be done with a direct study of any available records and analysis of prevailing market rates, or it could be done by comparison to similar properties at the same period of time. For the grazing land, I would want a different expert, and there could be any number of valid methods used to calculate the value of grazing land.

Once I gained a general sense of how much should have been received from each property, then the burden would be on the Secretary to demonstrate how much had actually been distributed to me or to my predecessors. I know that the Department must have some records, but then the Secretary may tell me once again that these records would be too expensive to produce, so she would like to rely on a statistical sampling of the average rate of accounting error for similar accounts. I would want to know a great deal more about the method she proposed to use, and whether it considered the types of errors and omissions that can occur in all phases of the trust business cycle, including title maintenance, probate, surveys, appraisal, sales procedures, collections, enforcement of lease terms, verification of resource quantity and value, accounting, investment, distribution and reporting. If all of these things were included, then I would want to know that it was tailored to my region of the country and the types of natural resources that are found on my lands.

I will give you an example. In my part of the country the most common use of land is for grazing, and the BIA has never had adequate staff to enforce on overstocking -- where a permittee will put more cattle on a piece of ground than allowed under the permit. After a couple of years this hurts the grazing resource, and next thing you know its carrying capacity has been cut in half. The Indian landowner is receiving only half of the value of the resource because the BIA did not properly carry out its responsibilities. This is a common problem on my reservation and I have seen it on other reservations throughout the country. Will the problems of lack of grazing enforcement in the Great Plains be factored into the methodology that the Secretary uses to determine the settlement offer? That is the kind of information I would need.

At some point, it would come down to what kind of number the Secretary had to offer. I would want to have the ability to accept or reject her offer based on my own understanding of what is fair and reasonable after I considered the properties involved and the activities on those properties. I would like to be able to make a counter-offer, and I may want to be able to divide up the different kinds of resources. I may feel comfortable

with the analysis of grazing values, but I may want to go back and study the oil issues some more. At the end, I want to feel that I was treated fairly by the Secretary of Interior. Indian people have been so abused and mistreated by the federal government, we are not willing to let it happen again.

Finally, I would like to note that this is only my own personal view of what might be necessary to settle my claims. Other account holders are in very different situations and might feel differently about what kind of information they need. One property owner might know that they have only a small interest in relatively low value land, so they would quickly accept a fixed offer. Another person might have extremely high value oil property and good reason to believe that royalties have gone uncollected. They may want much more research and investigation before they are willing to settle. This all goes back to the principal outlined above that one size will not fit all, and any settlement process will have to find ways to accommodate different classes of trust land ownership.

#### Opposition to Section 137 of House Interior Appropriations Bill - Forced Settlement of Indian Trust Funds Accounting

The context of this hearing is very important. In Congress there is an increasing frustration with respect to the seemingly inability of the Administration to resolve Indian trust accounting claims. The Senate Committee on Indian Affairs has corresponded with DOI, the Cobell Plaintiffs, and Tribal leaders on this topic; and has also scheduled a hearing. Another significant reflection of this desire is the FY04 Interior Appropriations bill, which includes legislation, Section 137, that would give the Secretary of the Interior the authority to unilaterally settle all claims relating to the accounting or the balance of any individual Indian money account. Under this proposal, the Secretary would adjust the balances in Indian trust accounts according to a statistical sampling methodology. The adjustments would be final and judicial review would be severely constricted.

Section 137 would be extraordinarily unfair to the Indian account holders. The Department of Interior is essentially acting as a bank for Indian trust accounts. This legislation would give the bank (Interior) complete authority to end all disputes over account balances under a methodology of its own choosing. It would absolve the Department of claims based on failed collections or inaccurate starting balances from predecessor accounts. All other claims would be limited to reviewing only the statistical sampling under a standard that is the most highly deferential to the Secretary. The legislation would presumably bar Cobell v. Norton outright. Tribes expect that federal government accounting for Indian trust funds be marked by transparency and high legal and moral standards – not designed to allow the federal government to absolve itself of accountability for its failures to manage Indian resources and funds in a manner consistent with the duties demanded of a trustee.

Moreover, no hearings have been held on this proposal, and there has been no consultation with tribes or with individual Indian account holders. Tribal leaders are interested to begin dialogue on settlement options for trust claims, but the process must be fair and respectful of the interests of tribal governments and individual Indian account holders. We are deeply appreciative of Chairman Pombo's opposition to Section 137, and would urge all of the members of the Committee to oppose it as well.

#### Additional Perspectives on Trust Reform

I would also like to take this opportunity to provide the Committee with some additional perspectives on trust reform to take into consideration during its deliberations.

The United States has a trust responsibility for Indian resources and the income produced from those resources. This responsibility was extended towards individual Indians as a result of the forced allotment of Indian reservation lands that began in the 1800's. The complexity of managing and accounting for these individual trust holdings and accounts increase with each passing generation and result in idle resources and loss of income to already impoverished tribal communities. It is well documented that the BIA has grossly mismanaged Indian trust funds and billions of dollars worth of resources through leasing, sale, and management of the natural resources on Indian lands, such as agriculture, grazing, timber, coal, minerals, and oil & gas.[1]

The 1994 American Indian Trust Funds Management Reform Act directed the Department of Interior and the Department of Treasury to complete a historical accounting of Indian trust funds and create a process to improve trust funds accounting in the future. Because the Departments have not met this Congressional mandate, a group of individual Indian account holders developed a class action lawsuit against the federal government. The Cobell v. Norton litigation has been in the federal court for over seven years, and because of the protracted refusal of the federal government to comply with its responsibilities under the statute, the federal judge has held numerous federal officials in contempt of court, and is now considering whether a

structural injunction is necessary to direct the historical accounting as well as the future reforms for trust administration.

NCAI has a strong interest in the Cobell litigation and any proposed settlement process. NCAI is the oldest and largest national organization representing Indian tribal governments and individuals, with a membership of more than 250 American Indian tribes and Alaska Native villages and thousands of individual Indian members. The tribal leaders of NCAI are the elected tribal representatives of their members who are individual Indian account holders, and as such have a direct concern about the management of individual IIM accounts held in trust by the federal government for the individual beneficiaries. As I noted, I am an IIM account holder and most of my constituents on the reservation are IIM account holders, and they look to me to speak on behalf of their concerns.

In addition, NCAI and tribal leaders have a direct interest in any decisions that may affect the ability of the Department of Interior as an institution to fulfill its broader obligations towards Indian tribes. These obligations encompass not only the responsibility to manage the resources that comprise the tribal estate, but also extend to the protection and advancement of tribes' inherent powers of self-government and rights to self-determination. The federal government also has treaty and trust obligations to provide education, health care and promote the general welfare of Indians, and to protect fishing, hunting and water rights and the integrity of the reservation environment. This obligation was underscored in the historic Message to Congress from President Nixon, H. Doc. No. 91-363, reprinted in Cong. Rec. 23258, July 8, 1970:

Termination [of the trust relationship] implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans. This goal, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Finally, the amounts the Department of Interior (DOI) holds in trust for tribes (\$2.6 billion) far exceeds the \$400 million held in individual Indian trust accounts. The tribal interests in trust land and natural resources are physically intermingled and recorded in the same title and ownership systems as the individual interests. In fact, in many instances, tribes and individuals hold undivided property interests in the same parcel of land. Sometimes individuals own the surface rights, and tribes own the subsurface rights under the same parcel. Additionally, tribal and individual resources are often managed and leased in large units under the same leasing or contractual agreements. In short, with respect to land and natural resources, tribal governments have a keen financial and management interest in the decisions that may affect the functioning of the common Indian trust systems.

#### Opposition to Current BIA Reorganization Efforts

As I noted above, consideration of a settlement process is a very positive step but it cannot be considered in a vacuum. Perhaps even more important than the historical settlement is the trust reform fix for the future. My mother's oil property may soon be in production again, and it is not in anyone's interest to allow the kinds of trust accounting failures of the past to be repeated in the future. I would like to devote the rest of this written testimony to explaining NCAI's position on other trust reform efforts that are underway within the Department of Interior.

NCAI is strongly opposed to the current trust reform reorganization effort that the DOI is engaged in, and to the dramatic shifts in BIA funding that are proposed in the FY04 budget. We would like the assistance of the Committee in stopping this process. NCAI Resolution PHX-03-040 regarding this issue is attached.

Tribal leaders understand better than anyone that the Bureau of Indian Affairs needs to change, that it has significant difficulty in fulfilling its responsibilities in management of trust funds, and that some of the problems relate to the way that the Bureau is organized. We want to see successful change and improvement in the way the BIA does business. We are not opposed to reorganization per se; we simply

want to do it right. We cannot afford to squander the opportunity we have before us.

In our view, effective organizational change to effectuate trust reform must contain three essential elements:

- (1) Systems, Standards and Accountability—a clear definition of core business processes accompanied by meaningful standards for performance and mechanisms to ensure accountability
- (2) Locally Responsive Systems—implementation details that fit specific contexts of service delivery at the regional and local levels where tribal governments interact with the Department
- (3) Continuing Consultation—an effective and efficient means for on-going tribal involvement in establishing the direction, substance, and form of organizational structures and processes involving trust administration.

These elements are lacking in the current proposal of the Department of Interior (DOI) for reorganizing the BIA.

The organizational charts which accompanied the DOI's plan show the establishment of newly created Trust Officers, potentially placed at every BIA local Agency Office. These Trust Officers are to be funded under the Administration's budget request for FY2004 for a significant initiative to increase funding for trust management within the Office of Special Trustee (OST). OST would receive a \$123 million increase – to \$275 million – which is partially offset by a \$63 million cut to the BIA Construction and an \$8 million cut to Indian Water and Claims Settlements.

Of BIA Construction accounts, Education Construction will lose \$32 million—despite a terrible backlog of new school construction needs that everyone agrees must be addressed. Tribal leaders have repeatedly emphasized that funding needed to correct problems and inefficiencies in DOI trust management must not come from existing BIA programs or administrative monies. It is critical that the DOI request additional funding from Congress to correct the internal problems created through administrative mistakes rather than depleting existing, insufficient BIA program dollars for these purposes. Increased funding for trust reform has the potential to be money well spent—but it is an empty promise if it comes at the costs of diminished capacity to deliver services to tribal communities, and is implemented without clear standards for federal accountability, a plan to put the money at the local level where it is most needed, and consultation with the tribes and individuals whose accounts are at stake.

We are extremely concerned that the lack of definition of the responsibilities and authorities of new OST offices will cause serious conflicts with the functions performed by the BIA Agency Superintendents and/or Indian tribes. The authority and role of the proposed Trust Officers need much more explanation. Moreover, we believe that the funding and staff needs to flow directly to the agency and regional levels—not just to new Trust Officers—to address long-standing personnel shortages needed to fully carry out the trust responsibility of the United States. Before DOI begins the process of establishing an entire new mini-bureaucracy, the financial and management impact of such an action must be thoroughly examined by the Congress and by affected tribal governments.

We believe that any attempt by DOI to implement its proposed reorganization without addressing the three essential elements we have identified above for trust administration will prove to be ill advised, premature, and ultimately disastrous. We fear that the DOI is on the verge of repeating the classic mistake that has ruined the majority of its efforts to reform trust administration in the past – a small group of executives get together and simply draw up a new organizational chart. The preoccupation with moving or creating boxes on a chart is the antithesis of how effective organizational change can and should be brought about.

We also firmly believe that this reorganization is putting the cart before the horse. Organizational structures must be aligned with specific business processes and they must be designed to function within a system where services are provided by the DOI and tribal governments. DOI has not yet figured out its new business processes. Millions of dollars have been invested in an “As-Is” study of trust services, but the Department has only just begun to undertake the critical “To-Be” phase of reengineering the business processes of trust management. By implementing a new organizational plan prematurely, DOI is running a great risk of ignoring the findings of its own study and wasting the valuable resources that the agency and tribes have already dedicated to understanding systemic problems. DOI will most likely refer to the recent “consultation” sessions that have occurred throughout the regions. I would note the tribal leaders strongly object to these so-called “consultations,” as the DOI representatives were informing the tribes about how the re-organization would proceed, and not discussing whether it adequately addresses tribal concerns

regarding meaningful trust reform.

Reorganization should only come after the new business processes have been identified and remedies devised through a collaborative process involving both BIA employees and tribal leadership. We must include the input of tribes and BIA employees so that the great numbers of people who must implement changes in trust administration understand and support necessary reforms. Only then, as a final step, can we design an organizational chart to carry out the functions of trust management without creating conflicting lines of authority throughout Indian country. The history of trust reform is filled with failed efforts that did not go to the heart of the problem and do the detailed, hard work necessary to fix a large and often dysfunctional system.

#### Developing an Alternative Approach to Reorganization of the Bureau of Indian Affairs

Tribal leaders very much agree with the goal of the proposed reorganization to ensure accountability for trust management throughout all operational levels. However we have a great concern that a "stove piped" reorganization, such as the current proposal, will sharply separate the ability to make decisions on trust resource management and trust services at the local level, and will put an unbearable level of bureaucracy into a system that is already overloaded with bureaucratic requirements. In short, tribal leaders want to ensure that decision-making and resources are placed at the local level. Tribes believe that the Department must maintain a single point of decision making authority at the local level to deal with issues that cut across both trust resource management and other trust services.

Reservations are active, developing communities that are very dependent on trust property, and need decisions made on routine matters at the local level in a reasonable time frame. For example, all of the major infrastructure activities like housing, roads, irrigation, drinking water, telephone service, etc. take place on trust land. There are also quite a number of important daily relationships at the local level regarding the provision of social services to elders and minors, and the management of their IIM accounts. Social workers, medical professionals and Superintendents work together to set up restricted accounts and approved spending plans for the protection of their trust funds. BIA and tribal law enforcement also must regularly deal with activities that take place on trust lands, deal with trust resources, or relate specifically to leasing activities. Examples of such circumstances include problems of trespassing cattle and the remedies under a grazing lease for impoundment or fees, timber theft and timber leases, violations of irrigation and water rights, eviction of a tenant for nonpayment on a lease, etc.

All of these types of decisions require strong coordination and decision making at the local level on matters that affect both a trust resource interest and the broader trust responsibility to provide services. These make up the routine kinds of decisions local BIA officials make that often never reach the central office level.

Imagine having to get central office approval every time there is a disagreement over a housing lease approval or construction of an irrigation ditch – this is something tribes don't want and we don't think the DOI wants either. Central office decisions take a long time – and this means more business deals go stale, more financing dries up, projects don't move forward, and the cycle of missed opportunities for Indian country is badly exacerbated.

We believe that trust reform reorganization can be effective in improving administrative accountability while still allowing for local decision making on routine matters that cut across trust resource management and trust services. We generally agree with the DOI that it would be valuable to group the trust funds management and the trust resource management activities at the local level, with clear lines of responsibility and staffing. However, we do not believe that the individuals responsible for these functions should be under a separate administrative authority from the staff responsible for performing other trust services. Rather, the BIA Regional and Agency office authorities should remain as the primary focal point of contact with individual tribes, preserving local control of functions and programs to support tribal self-determination. Accountability is not going to be assured through any organizational structure, but we believe it can be achieved in part with the following improvements:

- Identification of duties
- Adequate funding, staffing and training to perform those duties
- Policies, procedures, standards
- Internal controls



- External audits (performance and financial)
- Transparency (basis for decisions is clearly stated and evident)
- Adequate staff training with performance standards
- Focus on responsiveness to beneficiaries
- DOI/BIA staff committed to change and improvement of trust activities

In broad terms, tribal leaders have supported the idea of creating a structure that would have three major operational divisions under the Assistant Secretary for Indian Affairs: 1) Trust Funds and Trust Resources Management; 2) Trust Services (such as law enforcement, social services, roads, etc.); and 3) Indian Education. An administrative services section to handle such functions as budget, personnel and information systems would support these three divisions. Central office functions within these divisions could include: (1) the establishment of standards, procedures, protocols, internal controls for accountability, and program priorities; (2) delegations of authority to regional offices; (3) technical assistance; (4) reporting and troubleshooting; and (5) development of budgetary needs. The tribal leaders who participated in a Trust Reform Task Force with DOI suggested that the Office of Trust Funds Management and other offices, which are currently or prospectively under the administrative control of the OST, would be phased back into the BIA in order to have integrated beneficiary services. This is essential to maintain accountability; by having these offices report to the OST, the OST is placed in the tenuous and untenable position of overseeing itself.

At this time, Congress should prevent the DOI from proceeding with its proposed reorganization plan and focus instead on funding land consolidation that will in time reduce the cost of trust administration, and on developing good systems for the core trust business processes: land title, leasing and accounting. Without adequate land title, leasing and accounting systems, reorganization, especially as proposed by DOI, does little to effectuate true trust reform and the cost of reform of trust administration will continue to escalate.

#### Land Consolidation

Addressing fractionation is critical to improving the management of trust assets. Fractionation promises to greatly exacerbate problems that currently plague the DOI's efforts to fulfill its trust responsibilities, diminish the ability to productively use and manage trust resources, and threaten the capacity of tribes to provide secure political and economic homelands for their members. If allowed to continue unabated, fractionation will eventually overwhelm systems for trust administration and exact enormous costs for both the Administration and tribal communities.

Reduction of fractional interests will increase the likelihood of more productive economic use of the land, reduce record keeping and large numbers of small dollar financial transactions, and decrease the number of interests subject to probate. Management of this huge number of small ownership interests has created an enormous workload problem at the BIA. Given this, we do not understand why the FY2004 Administration request proposes a \$123 million increase for OST, but only a \$13 million increase (to total funding of only \$21 million) for the land consolidation program. Congress needs to put funding directly on the problem, and we believe that an investment in land consolidation will pay much bigger dividends than most any other "fix" to the trust system, including reorganizing the BIA.

#### Core Business Systems - What are We Trying to Fix?

Over the decades, Indian tribes have witnessed a multitude of trust reform initiatives, reorganizations, plans, meetings, summits, work groups, task forces, computer systems, software, outsourcing contracts, and other efforts to fix the problems with management of Indian trust funds. To date, none of these efforts have proven successful. The DOI has failed to correct fundamental deficiencies in core systems that are essential to trust funds accounting and trust resource management. NCAI believes that this Congress should focus its oversight efforts on these core systems to ensure that reform efforts meet requirements for fiduciary trust fund administration.

Indian trust fund administration requires accountability in three core systems that comprise the trust business cycle: 1) Title; 2) Leases/Sales; and 3) Accounting. These core systems must be accurate and integrated, timely, and be subject to credible standards and oversight. Pursuant to the 1994 American Indian Trust Funds Management Reform Act, these are exactly the systems that the Special Trustee should address. The Secretary must be able to provide to the beneficiaries an accurate and timely statement of the

source, type and status of the funds; the beginning balance; gains and losses; receipts and disbursements; and the ending balance. 25 U.S.C. § 4011. Correcting the DOI's performance in these core functions will also require the DOI to employ sufficient personnel, provide staff with proper training, and support their activities with adequate funds.

**Title** - The title and ownership system is the most fundamental aspect of the trust system. DOI cannot accurately collect and distribute trust funds if it does not have correct information about the owners of the trust assets. This is the starting point for any effort to fix the trust system.

Maintaining accurate ownership information is made exceedingly difficult by the ever-expanding fractionated ownership of lands divided and redivided among heirs. Today, there are approximately four million owner interests in the 10 million acres of individually owned trust lands, and these four million interests could expand to 11 million interests by 2030. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.

Currently, the BIA is using ten different title systems in the various Land Title Record Offices around the country, both manual and electronic. These systems contain overlapping and inconsistent information. The systems are largely "stand alone" in that they do not automatically reconcile the ownership information in the agency offices, in tribal records, or in the lease distribution records that are used for daily operations. Because records management standards and quality control procedures are lacking, there is no assurance that title records are accurate. These inaccuracies result in incorrect distribution of proceeds from trust resources, questions regarding the validity of trust resource transactions, and the necessity to repeatedly perform administrative procedures such as probate.

Consequently, a large backlog of corrections has developed in many of the title offices, and this has compounded the delays in probate, leasing, mortgages, and other trust transactions that rely on title and ownership information. In turn, each of these delays compounds the errors in the distribution of trust funds. See, Draft As-Is Model Preliminary Findings, Electronic Data Systems, December 20, 2002. Cleaning up the ownership information and implementing an effective title system that is integrated with the leasing and accounting systems is a primary need for the Indian trust system. NCAI encourages this Congress to ensure that expeditious reforms are made to the title system. The reorganization proposal, which is focused on developing oversight capacity at OST, appears to do little to address this most fundamental problem at the BIA.

**Leasing** – Most Indian trust transactions take the form of a lease of the surface or subsurface of an allotment, permits to allow the lessee to conduct certain activities in return for a fee, or a contract for the sale of natural resources such as timber or oil. Although leasing records are vital to ensure accurate collection of rents or royalties, there are no consistent procedures or fully integrated systems for capturing this information or for accurately identifying an inventory of trust assets. Currently, BIA has no standard accounts receivable system and many offices have no systems to monitor or enforce compliance, or to verify and reconcile the quantity and value of natural resources extracted with payments received. The accounting system most often begins with the receipt of a check that is assumed to be accurate and timely. Implementing an effective lease recording system that is integrated with the title and accounting systems is a primary need for the Indian trust system, but the BIA has only recently begun to investigate possible technologies for this effort. NCAI urges Congress to ensure that the information management and administrative systems put in place are organized to provide accurate and timely information regarding the trust resource transactions that produce the income that is deposited into trust fund accounts.

**Accounting** - The 1994 Act requires the Secretary to account for "the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian ... ." 25 U.S.C. § 4011. The DOI needs to develop accounting systems that will integrate and verify information from one function into another (from title to leasing to accounting). The DOI should also set out what oversight capabilities are planned into the system (verification and audit) as well as a plan for document retention and ease of access to facilitate audit and internal verification procedures. Furthermore, the DOI system needs a built-in crosscheck between BIA entries to its control account and Treasury's entries to its control account. This system should automatically produce a daily exception list that would be examined and remedied in a timely manner.

By its own representations, the Government makes clear that it still lacks a cohesive, integrated strategy for

fulfilling this fiduciary duty to accurately account for trust funds balances. Rather than focusing attention and energy on a reorganization, Congress should ensure that DOI develops the core trust systems – title, leasing and accounting – to ensure that those systems provide accurate information regarding the trust corpus as well as trust resource transactions that produce income that is deposited into trust funds on behalf of individual and tribal beneficiaries. Once these processes have been developed, an organizational structure can be developed to ensure their proper implementation.

#### Accountability and Standards

It is well known that DOI has mismanaged the Indian trust for decades. The real question for Congress is why decades of reform efforts have produced so little change in DOI's willingness to take corrective actions, to reconcile accounts, and to put adequate accounting and auditing procedures and policies in place.

The real answer to this is that the DOI and the Department of Justice have always viewed their primary role as ensuring that the U.S. is not held liable for its failure to properly administer trust assets. For this reason, they have never been willing to put any standards into regulations to govern the management of Indian trust assets, and the lack of standards has consistently undermined any effort to take corrective action on trust reform. What is needed is a clear signal from Congress to create a new culture of transparency and accountability for Indian trust management. Once the DOI understands that mismanagement will no longer be tolerated, the system will change and true reform will begin. In effect, the DOI is acting as a bank for Indian trust funds -- and just like every other bank in the U.S., the DOI must be subject to standards and accountability.

Beyond the issue of reorganization, we believe that it is critical for Congress to substantively address the underlying issues of transparency and accountability in fixing the trust system. We would greatly encourage the Committee to take up trust reform legislation that would hold the DOI to the ordinary standards of a trustee, and we would be pleased to work with you in developing that legislation.

#### Continuing Involvement of Tribal Governments

Tribal governments must be substantively and continuously involved in trust reform efforts, working in partnership with Congress and the Administration. Trust Administration goes to the heart of government-to-government relationships and to the capacity of tribal governments to exercise their sovereign powers and ensure that the rights and interests of its members are protected and well served. Tribal governments have a great deal at stake in developing effective mechanisms for trust administration within unique political-legal-economic relationships with the United States. We urge Congress to make every effort to ensure that tribes are "at the table" when critical decisions regarding trust reform are being made.

#### Conclusion

On behalf of NCAI, I would like to thank the members of the Committee for all of the hard work that they and their staffs have put into the trust reform effort. If we maintain a serious level of effort and commitment by Congress, the Administration, and Tribal Governments to work collaboratively together to make informed, strategic decisions on key policies and priorities, we can provide the guidance necessary to bring about true reform in trust administration.

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[1] See *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 499, 102ND Cong., 2ND Sess. 1992, 1992 WL 83494 (Leg.Hist.), and, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results* (Letter Report, 05/03/96, GAO/AIMD-96-63).